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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1390

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

RESPONSE TO BRIEF OF APPELLEES GRAF AND COMERFORD IN REPLY TO JURISDICTIONAL STATEMENT OF APPELLANTS

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Appellees.

RESPONSE TO BRIEF OF APPELLEES GRAF AND COMERFORD IN REPLY TO JURISDICTIONAL STATEMENT OF APPELLANTS

Preliminary Statement

On May 5, 1975, Appellants Town of Lockport, New York and Floyd Snyder, docketed an appeal in this Court

(Docket No. 74-1390) appealing from a Judgment of the United States District Court for the Western District of New York convened as a three-Judge Court.

That judgment in *Citizens for Community Action, etc., et al.* v. *Ghezzi, etc., et al.*, 361 F. Supp. 1 (W.D.N.Y. 1974) declared unconstitutional Article IX Section 1(h)(1) of the Constitution of the State of New York and Section 33(7) of the Municipal Home Rule Law. Additionally, injunctive relief was granted by the Court requiring the filing and implementation of the Niagara County Charter which was passed by a majority of the voters in a referendum held November 7, 1972.

Appellee John J. Ghezzi, Secretary of State of the State of New York did not appeal from that judgment.

Appellees LaVerne S. Graf and Kenneth Comerford have filed a Reply to the Jurisdictional Statement of Appellants in which they contend that the questions raised by the jurisdictional statement are now moot.

The basis for the mootness argument by Appellees Graf and Comerford is that the 1972 Niagara County Charter was supplanted by a Charter passed by a referendum of the Niagara County electorate on November 5, 1974. That Charter has since been accepted for filing by Appellee Ghezzi pursuant to his statutory duty as Secretary of State of the State of New York.

By letter dated June 18, 1975, the Honorable Michael Rodak, Jr., Clerk of the Court informed counsel for Appellee John J. Ghezzi, that this Court had directed that a responsive pleading be filed by Appellee Ghezzi responding to those contentions of mootness.

This brief is submitted pursuant to that direction by this Court.

THIS APPEAL IS NOT MOOT

A. Question I Raised By The Jurisdictional Statement Of Appellants Is Not Moot

Appellants ask this Court to review the determination by the District Court that Article IX, Section 1(h)(1) of the Constitution of the State of New York and Section 33(7) of the New York Municipal Home Rule Law are violative of Amendment Fourteen to the United States Constitution.[1]

This issue is viable even though the 1972 Charter has been superseded by the 1974 Charter.[2]

The issue transcends the vehicle which brought it to the District Court.

The 1972 Charter was passed by a majority of the Niagara County electorate. However, it failed to gain approval by the Towns of that County. As a result, and pursuant to the provisions of law challenged by plaintiffs below and subsequently held unconstitutional by the District Court, that Charter could not be accepted for filing by Appellee John J. Ghezzi, as Secretary of State.

During the pendency of the action in the District Court, the 1974 Charter was placed before the Niagara County electorate and was again passed by the majority of the voters but again failed to gain the approval of the majority of the voters residing in the Towns of Niagara County.

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[1] Jurisdictional Statement For Appellants, p. 5, Docket No. 74-1390 (May 5, 1975).

[2] Although the District Court ordered the implementation of the 1972 Charter, the 1974 Charter had been approved by the Niagara County Electorate prior to the judgment of the District Court.

The same allegations of unconstitutionality of the provisions of New York State Law which prohibited the filing of the 1972 Charter would apply should Appellee Ghezzi as Secretary of State have failed to file the 1974 Niagara County Charter.[3] In fact, should this Court dismiss the appeal for mootness, one could reasonably predict a new action by Appellees Citizens for Community Action and Francis Shedd, attacking the 1974 Charter on the same basis as their challenge to the 1972 Charter.[4]

The substance of the lawsuit below never dealt in any manner with the contents of the 1972 Charter, but only with the statutes of the State of New York which governed its adoption.

The constitutional issues remain to be authoritatively adjudicated by this Court. The question presented by Question I of the Jurisdictional Statement is not moot.

In *Moore* v. *Ogilvie,* 394 U.S. 814, 89 S. Ct. 1493 (1969) this Court reaffirmed the standard applicable to a controversy alleged to have been rendered academic by succeeding events.

Moore, involved a suit for declaratory relief brought by candidates for the offices of electors of President and Vice President of the United States from Illinois. The plaintiffs were to be candidates on the November 5, 1968 ballot.

[3] Appellee Ghezzi accepted the 1974 Charter on February 28, 1975 following the Judgment of the District Court declaring Article IX, Section 1(h)(1) of the New York State Constitution and Section 33(7) of the Municipal Home Rule Law unconstitutional.

[4] Appellees Citizens for Community Action and Francis Shedd, the plaintiffs below, have asked this Court for a Summary Affirmation of the judgment below. (See p. 10 Motion to Affirm and Brief of Appellees Citizens for Community Action and Francis W. Shedd, Docket #74-1390, May, 1975.)

Plaintiffs sought the declaration of unconstitutionality and the enjoining of certain Illinois statutes alleged by plaintiffs to be violative of this Court's "one man, one vote" decisions. The statutes sought to be enjoined barred their being on the November 1968 ballot. The three-Judge United States District Court dismissed the Complaint. Before the appeal could be heard in this Court the election was held. Defendants moved this Court for a dismissal of the appeal on the ground of mootness.

This Court recognized that as long as Illinois maintained her system of nominating such candidates the problem was

> "'Capable of repetition yet evading review.' *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L. Ed. 310 (1910). The need for its resolution thus reflects a continuing controversy in the federal-state area where our 'one man, one vote' decisions have thrust." *Moore* v. *Ogilvie, supra,* 394 U.S. 814, 816, 89 S.Ct. 1493, 1494 (1969).

This Court refused to dismiss the appeal as moot.

Similarly, in the instant case, the ground of decision by the District Court and therefore the issue on the appeal is whether the provisions of the New York State Constitution and the statute involved, violates the "one man, one vote" decision of this Court. That issue is not moot notwithstanding that the 1972 Charter has been superseded by the 1974 Charter.

Should this Court dismiss the appeal for mootness and vacate the judgment of the District Court pursuant to its practice in such situations, *United States* v. *Munsingwear, Inc.,* 340 U.S. 36, 39, 71 S. Ct. 104, 106 (1950), the question in the instant appeal, "is capable of repetition yet evading review." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission, supra.*

B. Question II Raised By The Jurisdictional Statement Of Appellants Is Not Moot

Question II propounded by Appellants urges this Court to reverse the District Court upon the grounds that the Court granted injunctive relief improperly. Jurisdictional Statement of Appellants, *supra* at 21.

The thrust of Appellants' argument is that the electorate of Niagara County voted on the proposed Charter believing that the Charter had to obtain the dual majority required by the State Constitution and Municipal Home Rule Law in order to become effective. Similarly, Appellants argue that those proponents of the Charter taking an active role in seeking its approval managed their voter education campaigns based upon the dual majority requirement.

Both the 1972 and 1974 Niagara County Charter Referendums occurred prior to the District Court's decision and Order holding the dual majority requirement unconstitutional.

The issues raised by Question II of Appellants' Jurisdictional Statement apply to the 1974 Charter as well as to the 1972 Charter.

C. Question III Raised By The Jurisdictional Statement Of Appellants Is Not Moot

Question III propounded by Appellants urges this Court to reverse the District Court upon the grounds that Plaintiffs-Appellees Citizens for Community Action and Francis W. Shedd were barred from commencing the lawsuit below on the grounds of *res judicata*. Jurisdictional Statement, *supra*, at 22-23.

The basis for this contention by Appellants is that the District Court erred in finding no privity as between the Plaintiffs-Appellees in the instant case and the plaintiffs in a prior action.[5]

The questions of privity and the application of *res judicata* do not involve, in any manner, the contents of the Charters. Rather, they involve issues only as to whether the unsuccessful Plaintiffs in *County of Niagara* were sufficiently representative of Plaintiffs-Appellees Citizens for Community Action and Francis W. Shedd, so as to have barred them from commencing the lawsuit now before this Court.

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[5] In 1973 an action in the name of *County of Niagara, New York* v. *State of New York*—Civ. 1972-656 (W.D.N.Y. April 3, 1973) was dismissed on the merits. (See Appendix D to Jurisdictional Statement of Appellants, pp. 24a-28a). That action sought relief identical to that sought in the instant case. The District Court, (HENDERSON, J.), held the constitutional issues raised to be insubstantial.

Conclusion

The questions presented to this Court for review involve the constitutionality of portions of the New York State Constitution and New York State Municipal Home Rule Law. Additionally, the questions involve legal issues unrelated to the contents of either the 1972 or 1974 Niagara County Charters. Those issues are capable of repetition unless reviewed and determined by this Court.

The questions are not moot.

Dated: July 2, 1975.

Respectfully submitted,

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